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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 266

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

MAZINE Z. FOX ET AL.

No. 267

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

PHILLIP LOUIS PARKS ET AL.

No. 268

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

JACOB F. OTTMULLER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR HAROLD L. ICKES, SECRETARY OF THE INTERIOR

OPINIONS BELOW

The Supreme Court of the District of Columbia filed a memorandum opinion relating to the mo-

tions for leave to file amended bills of complaint (Fox R. 30; Parks R. 23; and Ottmuller R. 23), which was in effect adopted in the memorandum opinion on the motions to dismiss (Fox R. 50; Parks R. 40; Ottmuller R. 47). The opinion of the United States Court of Appeals for the District of Columbia (Fox R. 55; Parks R. 44; Ottmuller R. 51) is reported in 85 F. (2d) 294.

JURISDICTION

The judgments of the Court of Appeals were entered on June 8, 1936 (Fox R. 62; Parks R. 52; Ottmuller R. 59). The petition for writs of certiorari was filed on August 7, 1936 and was granted on October 12, 1936 (Fox R. 64; Parks R. 52; Ottmuller R. 59). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED[1]

Whether the United States is an indispensable party defendant in these suits, brought to compel the Secretary of the Interior to restore respondents to their alleged rights to receive larger amounts of water from the Yakima Irrigation Project than in terms provided by their water right contracts with the United States.

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[1] The petition for certiorari set forth a second question, relating to the basis of equity jurisdiction, which the Government now believes unnecessary to argue.

STATUTES INVOLVED

The pertinent provisions of the Federal reclamation law and of the statutes of the State of Washington are set forth in the Appendix (*infra*, pp. 34–38).

STATEMENT

These were three special appeals to the United States Court of Appeals for the District of Columbia by the Secretary of the Interior, Harold L. Ickes, from orders of the Supreme Court of the District of Columbia which denied his motions to dismiss amended bills in equity brought, in the language of the bills, to require him to vacate certain notices and orders relating to the Sunnyside Unit of the Yakima Project, a Federal reclamation project in the State of Washington, and to restore respondents "to the rights and privileges which they enjoyed prior to the promulgation of said notices and orders" (Fox R. 41; Parks R. 33; Ottmuller R. 34). The effect of this prayer seems to be that respondents seek an order compelling the Secretary of the Interior to deliver the amount of water which had been delivered prior to these notices. The three cases have, for purposes of argument, been consolidated in both the lower courts.

Pursuant to the Reclamation Law (U. S. C., Title 43, c. 12) and applicable statutes of the State of Washington (8 Remington's Rev. Stat. §§ 7408–7415), the United States in 1906 undertook the construction and operation of the Yakima Project and

in connection therewith purchased from the Washington Irrigation Company, a Washington corporation, the Sunnyside canal, water appropriations, and irrigation system used in connection therewith (Fox R. 32; Parks R. 25; Ottmuller R. 25). The United States also made water appropriations from the Yakima River system and provided storage for these appropriated waters in reservoirs constructed, owned and operated by the United States (U. S. C., Title 43, Sec. 498, *infra*, p. 35) as expressly authorized by the laws of Washington (Remington's Rev. Stat. §§ 7408, *et seq.*, *infra*, p. 36.)

The owners of the lands, within the Sunnyside Unit of the Yakima Project and now held by the respondents, executed water-right applications and contracts and delivered them to the United States. By virtue of these water-right applications and contracts, respondents' predecessors became entitled to receive designated amounts of water from the United States under specified conditions.

In the *Fox* case the measure of the water right purchased by respondents' predecessors in title is stated in the several applications (R. 17, 20, 24) to be:

> The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water sup-

> ply actually available as determined by the project manager or other proper officer of the United States, or of its successors in the control of the project, during the irrigation season for the irrigation of lands under said unit.

Respondents allege that the water right acquired under this language entitles them to 4.84 acre-feet of water per acre per annum (R. 34–35).

In the *Parks* case the measure of the supplemental water right purchased by respondents' predecessors in title is fixed in the water-right contract (R. 17) as:

> The amount of water to be furnished hereunder shall be three acre-feet of water per annum per acre measured at the land, or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States, and the water shall be used only to irrigate said lands and for domestic purposes incident thereto; provided, that the amount of water furnished shall be limited to the amount beneficially used upon such lands.

Respondents allege that the water right acquired entitled them to 6 acre-feet of water per acre per annum (R. 26–27).

In the *Ottmuller* case the measure of the water right purchase by respondent's predecessors in

title is stated in the water-right application (R. 37) as follows:

> The quantity of water to be furnished hereunder shall be 3 acre-feet of water per annum per acre of irrigable land, as aforesaid, measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land;

Respondent alleges that the water right acquired by virtue of this language entitles him to 5.56 acre-feet of water per acre per annum (R. 27–28).

On October 17, 1930, the Assistant Secretary of the Interior issued a public notice which pointed out that, while it had previously been possible to allow to the water users of the Sunnyside Unit the temporary use of water in excess of the amounts specified in their respective contracts and water applications, it had now become necessary, by reason of the completion of the Kittitas Division of the Yakima project, to limit deliveries in the Sunnyside Unit to the amounts actually specified in the contracts and applications relating to lands in that unit (Fox R. 46–47; Parks R. 36–37; Ottmuller R. 43–44). Pursuant to this notice and, in the Parks case, a later notice of May 5, 1932 (Parks R. 38–39), respondents were limited to substantially smaller amounts of water than they had there-

tofore received. Fox (R. 37) and Ottmuller (R. 30) were limited to 3 acre-feet and Parks (R. 29) to 3.5 acre-feet. The notice stated that water in excess of these amounts, which might be required by such users, would be available at a stated water rental.

The bills originally filed by respondents were dismissed on the Secretary's motion because "In each of these cases the bill seeks to compel the defendant to carry out an [executory] contract of the United States." (Fox R. 29; Parks R. 21; Ottmuller R. 22.)

Respondents were then granted leave to file amended bills (Fox R. 31; Parks R. 23; Ottmuller R. 24), in which they allege that the notices and orders of the Secretary, of which the 1930 notice mentioned above is the basic one, are arbitrary and in excess of authority, and pray that the Secretary of the Interior be ordered to vacate these orders and notices, and that he be further ordered to restore respondents to their former rights (Fox R. 41; Parks R. 33; Ottmuller R. 34). Petitioner moved to dismiss because the United States was a necessary party in that, among other things, the bills sought specific performance of contracts of the United States and would affect the interest of the United States in its property. (Fox R. 49–50; Parks R. 39; Ottmuller R. 46). The motion was denied for the reasons which led the trial judge to allow the amended bills to be filed (Fox R. 50;

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Parks R. 40; Ottmuller R. 47). These, as stated in his memoranda (Fox R. 30; Parks R. 23, Ottmuller R. 23), were:

> It appears from the proposed amended bills that the orders made by the defendant are not authorized by Congress, and had they been so authorized, would have deprived the plaintiffs of vested rights. The suits are not brought against the United States but to set aside unauthorized acts of the defendant in cases in which he has no discretionary powers, and is acting arbitrarily.

Petitioner petitioned the Court of Appeals for a special appeal under the Act of February 9, 1893 (c. 74, 27 Stat. 434, 436), which was granted (Fox R. 51; Parks R. 41; Ottmuller R. 48). The decision of the trial court was affirmed, Judge Stephens dissenting[2] (Fox R. 55–62).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the Supreme Court of the District of Columbia had jurisdiction to entertain these suits, in substance and effect suits to compel specific performance of contracts to which the United States is a party and to affect property in which it has an interest.

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[2] The Court of Appeals delivered one opinion, covering all three cases. References will be made to the *Fox* record.

2. In holding that the present suits do not seek in substance and effect specific performance of contracts to which the United States is a party.

3. In holding that the United States was not an indispensable party defendant in these suits.

4. In failing to hold that the amended bills of complaint and the exhibits attached thereto and made a part thereof show that the suits were brought on contracts to which the United States is a party, and that the decree prayed for would affect the interests of the United States in said contracts and the property of the United States, and that consequently the court was without jurisdiction.

5. In affirming the judgment of the Supreme Court of the District of Columbia, denying the petitioner's motions to dismiss the amended bills of complaint.

SUMMARY OF ARGUMENT

The United States is an indispensable party defendant to these suits, whether respondents' claims be viewed as based on contracts with the United States or as resting on alleged property rights asserted contrary to the claims of the United States.

If the bills are based on contracts with the United States, it is therefore an indispensable party defendant which has not consented to be sued in this manner, and they must be dismissed. *Wells* v. *Roper*, 246 U. S. 335; *Goltra* v. *Weeks*, 271 U. S.

536. The bills are obviously based on rights claimed under contracts with the United States, unless petitioner succeeds in showing a property right in the water independent of these contracts. It is plain under the statutes and decisions of Washington which govern the appropriation of the water now in question that the United States, in storing and distributing the water, is the sole owner and appropriator of the water and that the respondents have no right to the water apart from the contract obligations of the United States.

In any event, the court below and the respondents base their argument that these are not suits on the contracts with the United States on the ground that respondents have a property right in the water independent of the contracts with the United States. This claim is asserted in opposition to the claim of the United States to full ownership of the water, which is in its possession. Thus the plea for jurisdiction is self-defeating, in that it rests upon a request that the court determine the title adversely to the United States, which is thus an indispensable party defendant. *Goldberg* v. *Daniels,* 231 U. S. 218; cf. *Arizona* v. *California,* No. —, Orig., October Term, 1935.

ARGUMENT

THE UNITED STATES IS AN INDISPENSABLE PARTY DEFENDANT

These suits seek relief against the petitioner which amounts to a mandatory injunction that the petitioner deliver to the respondents the same amount of water as was delivered prior to the completion of another division of the Yakima reclamation project. (See Fox R. 41; Parks R. 33; Ottmuller R. 34.) Respondents seek to convert into a vested right the privilege of receiving more water than specified in their contracts, irrespective of the needs of other lands dependent upon the Yakima Project for their irrigation. See Public Notice of October 17, 1930, explaining the reasons for restricting water deliveries to the contract terms[3] (Fox R. 46–47; Parks R. 36–37; Ottmuller R. 43–44).

The Government submits that these suits must fail because the lower courts had no jurisdiction to entertain them. (1) Respondents have, we believe, no rights whatever apart from their contracts with the United States. (2) In asserting a property right in the water, respondents lay claim to prop-

[3] This Public Notice indicates that the water to be furnished under its terms is sufficient, with economical use, to irrigate respondents' lands; respondents, on the other hand, allege that it is wholly insufficient (Fox R. 38; Parks R. 30; Ottmuller R. 31).

erty claimed by and in the possession of the United States. By either of these analyses it is quite clear that the United States is an indispensable party defendant and that the bills must accordingly be dismissed.

1. The Suits are Based Solely on Contracts with the United States

If the United States was the appropriator and is the owner of the water rights in question, the respondents can have no claim apart from their contracts with the United States. It would necessarily follow that the suits were brought on contracts with the United States and that the motions to dismiss the bills should have been granted. If the rights claimed arise under contracts with the United States, the suits are in effect brought against the United States, which is thus an indispensable party defendant who has neither been joined nor has consented to be sued in this manner. *Wells* v. *Roper,* 246 U. S. 335; *Transcontinental & Western Air* v. *Farley,* 71 F. (2d) 288 (C. C. A. 2d), certiorari denied, 293 U. S. 603. In addition the relief sought would be the substantial equivalent of specific performance of a contract with the United States, which no court has jurisdiction to award. *Goltra* v. *Weeks,* 271 U. S. 536, 546; *United States ex rel. Shoshone Irrigation District* v. *Ickes,* 70 F. (2d) 770, 773 (App. D. C.), certiorari denied, 293 U. S.

571; *Boeing Air Transport* v. *Farley,* 75 F. (2d) 765 (App. D. C.), certiorari denied, 294 U. S. 728.

The court below held that these suits were not based upon respondents' contracts with the United States but were merely brought to enjoin the enforcement of an illegal order (Fox R. 59–60). This decision is necessarily grounded on the holding (Fox R. 60) that the respondents have appropriated the water and applied it to a beneficial use, and accordingly have title to and a vested right in the water independently of their contracts with the United States. Respondents make the same argument (Br. in Opp. 21–24). The Government submits that this position is plainly contrary to the applicable law.

The amended bills of complaint set forth that the Secretary of Interior approved the Sunnyside unit of the Yakima project in 1906 (Fox R. 32; Parks R. 25; Ottmuller R. 25). The United States obtained the water for irrigation of the lands in this unit in two manners: it purchased the appropriations of the Washington Irrigation Company (Fox R. 32; Parks R. 25; Ottmuller R. 25) and it constructed additional reservoirs in which it stored the surplus water of the Yakima River (Fox R. 35; Parks R. 26–27; Ottmuller R. 27). At the time this project was commenced the lands of two of the respondents were "arid and unproductive", although they were "susceptible to irrigation" (Fox R. 32; Ottmuller R. 25). The land of the third respond-

ent, at least since 1903, had been irrigated by water "acquired by purchase from the Washington Irrigation Company, the then owners of the Sunnyside Canal and water appropriations from the Yakima River" (Parks R. 24–25). It is plain that none of the respondents has himself actually diverted water from the river, that in the case of two of them the water has been received only pursuant to the contracts made with the United States, and that the third has used water acquired only under contracts first with the Washington Irrigation Company and then with the United States.[4]

Whether these circumstances give the respondents any sort of a property right in the water must be determined in the light of state law, to which the reclamation activities of the Federal Government are expressly made subject. (Act of June 17, 1902, *infra*, p. 34.) The basic inquiry is

[4] The Court of Appeals states in its opinion (Fox R. 56) that respondents base their claims "primarily on the rights acquired by them or their predecessors by purchase from the Washington Irrigation Company." We do not understand respondents so to claim. In any event this statement is not warranted upon the records in these cases. As applied to respondents Fox and to respondent Ottmuller, it finds no possible support in the record; they obtained water only under contracts with the United States. The bill of complaint in the *Parks* case asserts that prior to the initiation of the Yakima project the then owners of the land involved in that case purchased a water right for their land and "that after said purchase there was actually furnished * * * six acre-feet of water" (R. 25). It is significant that the bill does not allege that the *purchase* was of such an amount of water. On the contrary, the original bill alleged that the Washington Irrigation Company water right "was equivalent to 2.62 acre-feet" (R. 2).

whether the mere use of water supplied under contract with the operator of a storage and irrigation system is sufficient to give title to the water independently of the contract. The court below and the respondents have confused this inquiry by their failure to consider the law of the State in which, and the date at which, the rights are said to have accrued.

Some of the arid States, by statute or by decision, have modified the doctrine of first appropriation to require that there be actual beneficial use by the appropriator. See *Wiel,* Water Rights in the Western States, II, *c.* 57, pp. 1235–1248 (3rd Ed.). Colorado seems to have gone farther in this direction than has any other State. Under the law of that State, the fact of storage and distribution does not constitute appropriaion, but merely makes the carrier of the water a trustee for the consumer, in whom the property right rests. *Highland Ditch Co.* v. *Union Reservoir Co.,* 53 Colo. 483; *Pioneer Irrigation Co.* v. *Board of Commissioners,* 236 Fed. 790, 792 (D. Colo.). These were the only cases cited by the court below to support its holding that respondents, rather than the United States, were the appropriators and owners of the water in question.

This case, however, involves the law of Washington rather than that of Colorado. It is therefore unnecessary to consider whether the Colorado doctrine is applicable to irrigation projects operated by the United States, for it is quite clear, under the applicable Washington law, that the one who di-

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verts water for sale or distribution to others has made a full appropriation and has full title to the water.

Prior to 1917, the appropriation of water was governed by the Act of 1891 (Laws 1891, p. 327, Sec. 1; 2 Remington's 1915 Code, Sec. 6316) which provided:

> The right to the use of water in any lake, pond, or flowing spring in this state, or the right to the use of water flowing in any river, stream, or ravine of this state, for irrigation, mining, or manufacturing purposes, or for supplying cities, towns, or villages with water, or for waterworks, may be acquired by appropriation, and as between appropriations, the first in time is the first in right.

It is thoroughly settled under this Act that the one who impounds water in a reservoir and distributes it under contract with the agricultural users is the appropriator, and that those who contract with him gain no property rights in the water from its use but have merely their contract rights against the distributor. In *Lanham* v. *Wenatchee Canal Co.*, 48 Wash. 337, the court held that a parol license by which the landowner had for several years taken water from an uphill ditch gave him no rights beyond his contract, limiting his water to the main canal, which was down-hill. In *Shafford* v. *White Bluffs Co.*, 63 Wash. 10, the court sustained the power of the distributor to inaugurate the practice of delivery on alternate days instead of continuously; the decision was based solely

upon construction of the contract. In *Black* v. *Baker,* 126 Wash. 604, the court held that a contract to deliver water, in return for a lump-sum consideration, was not enforceable against a successor corporation which took over the distribution system upon the insolvency of the contracting distributor. Other cases have assumed as a matter of course that the remedy for failure to supply the agreed water is one for breach of contract, or for its specific enforcement. *State ex rel. Krutz* v. *Washington Irrigation Co.,* 41 Wash. 283; *Lombard* v. *Schlotfeldt,* 68 Wash. 518; *Hotchkin* v. *Wenatchee Heights Orchard Co.,* 75 Wash. 361; *Huschke* v. *Arcadia Orchards Co.,* 89 Wash. 423; *McDonald* v. *Prosser Falls Land & Power Co.,* 110 Wash. 175; *Hill* v. *Selah & Moxee Irrigation District,* 139 Wash. 120; *Talbott* v. *Whitestone Reclamation District,* 154 Wash. 102. In *Duns-muir* v. *Port Angeles Gas Co.,* 24 Wash. 104, 114, the court said, by way of dictum:

> While it is true that water in a running stream is deemed in law a part of the land over which it flows, it is also true that, after it has been diverted from its original channel and conveyed elsewhere in pipes for distribution or sale, it loses its original character and becomes personal property.

Compare *Methow Cattle Co.* v. *Williams,* 64 Wash. 457, 460. See also *Wiel, supra,* Secs. 35, 36.

In this state of the law, it is plain that the United States is the appropriator of the water and that the respondents have no title to the water but

merely contract rights against the United States. Two federal courts have held, in regard to this very Yakima project, that the United States is the appropriator of the water distributed to the landowners. In *United States* v. *Union Gap Irrigation Co.*, 209 Fed. 274, 276 (E. D. Wash.), the court said:

> The right of the plaintiff to maintain this suit is beyond question. Aside from any rights it may have acquired under the legislative act of 1905, it acquired by purchase from the Washington Irrigation Company, on the 23d day of June, 1906, the Sunnyside Canal, having its intake below Union Gap in Yakima county, together with an appropriation of 1,000 cubic feet of water per second of time, made by the Northern Pacific, Yakima & Kittitas Irrigation Company on the 22d day of April, 1891, and it has a manifest right to protect this appropriation and the rights acquired thereunder by injunction.

The Circuit Court of Appeals for the Ninth Circuit reached an identical result in *West Side Irrigation Co.* v. *United States*, 246 Fed. 212, 217, where it said:

> Also without merit is the contention that the United States has no authority to maintain the suit. The United States, according to the allegations of the complaint,[5] is an ap-

[5] The decision cannot be explained away as resting upon admissions of fact by the defendants. The appeal was taken after final decree, not from action on a motion to dismiss. The court, in apparently treating appropriation as a question of fact, necessarily decided that the facts of storage, diversion, and distribution amounted in law to an appropriation.

> propriator of water, and a purchaser of other appropriations of water from the Yakima river for use in irrigation projects, and it clearly has the right to protect, not only those interests, but also the whole project and scheme of reclamation which it has undertaken under the authority of Congress by the act of June 17, 1902, known as the Reclamation Act.

The cases are numerous which reflect the general doctrine that construction and operation of a reservoir and distribution system constitutes an appropriation of the water sold under contract for irrigation purposes. See *Kinney,* Irrigation and Water Rights, II, Secs. 703, 704. This Court has on several occasions applied this principle. In *San Joaquin Co.* v. *Stanislaus County,* 233 U. S. 454, this Court held that the distributor had a property right in the water so appropriated which was protected by the Federal Constitution. In *Gutierres* v. *Albuquerque Land Co.,* 188 U. S. 545, 555–556, the Court held that there was nothing in the Desert Land Act to prevent the operation of a local statute permitting appropriation for sale, and that the beneficial use need not be made directly by the appropriator.

If there were any doubt that the United States, rather than the respondents, is the appropriator of this water, it would be set at rest by the Washington statute authorizing appropriations of water for Federal reclamation projects. The Act of March 4, 1905 (Laws 1905, c. 88, p. 180) gave to the United

States a general power to make use of water, and exercise the power of eminent domain in aid of these projects. In Section 4 it provided that any authorized officer of the United States "may appropriate, in behalf of the United States, so much of the unappropriated waters of the state as may be required for the project." (8 Remington's Rev. Stat. sec. 7411, *infra*, p. 36). This Act makes it plain that the legislature contemplated that the United States, and not the landowners with whom it contracts, was to be considered the appropriator and owner of the stored waters.

THE CONSIDERATIONS RELIED UPON BY THE COURT BELOW

1. Both the court below (Fox R. 57) and the respondents (Br. in Opp. 12, 16, 26) are of the opinion that Section 8 of the Reclamation Act (43 U. S. C. 372, *infra*, p. 34) makes inapplicable the doctrine that storage and distribution of the water constitutes full appropriation and gives full title. That section, after providing that appropriations should be made under state law, adds the following proviso:

> The right to the use of the water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

It may be conceded that this language would offer support to respondents if it were plainly directed toward the relationship between the landowners and the United States. However, its legis-

lative history makes perfectly clear that it was designed only to prevent speculative profits by forbidding alienation of the water right for use on other lands or for other purposes. The House Committee on Irrigation of Arid Lands,[6] in reporting the bill favorably, said (H. Rpt. No. 1468, 57th Cong., 1st Sess., p. 7):

> * * * In order that the water rights acquired under the provisions of the act shall be of the character most approved by centuries of irrigation practice, and such as will absolutely insure the user in his right and prevent the possibility of speculative use of water rights, the character of the right which is contemplated under the act is clearly defined to be that of appurtenance or inseparability from the lands irrigated and founded on and limited by beneficial use.

Senator Hansbrough, in charge of the bill, put the matter more graphically on the floor of the Senate (35 Cong. Rec. 1385):

> * * * under existing land laws, sources of water supply are being seized upon with great rapidity, largely by men who are not able to utilize them and who are holding them for speculative purposes. For example, a man may secure control of a spring or locality where water might be held to irrigate 10,000 acres. He holds this for his cattle or for raising forage. He has not the

[6] The Senate report merely paraphrased the provision without comment. Sen. Rpt. No. 254, 57th Cong., 1st Sess., p. 2.

> means to conserve the water, nor could he do this profitably * * * and so these public lands around him lie idle.
>
> There are thousands of such instances. In one way or another control of the situation is rapidly passing away from the people, and vested rights are growing up.

Congressman Mondell, in charge of the bill, described this proviso on the floor of the House (35 Cong. Rec. 6679):

> * * * These most important provisions of the law prevent all the evils which come from recognizing a property right in water with power to sell and dispose of the same elsewhere and for other purposes than originally intended.

This Court has held that under the Reclamation Act the United States is the appropriator of the water which it distributes under irrigation contracts.[7] In *Ide* v. *United States,* 263 U. S. 497, it upheld the power of the United States to enjoin users from interfering with attempts to recover seepage water, escaping from lands irrigated through the Shoshone project. The decision was that the ownership and control of the water by the United States was such that, even after "sale" to landowners, it had power to recover the seepage

[7] In this connection the law of the State is immaterial. If Section 8 of the Reclamation Act has the force ascribed to it by the court below, it would give title in the water to the landowner whatever the applicable State law (and notwithstanding the express provision that the law of the State should govern).

water against the claims of others who were actually using this water.[8] The Court said (pp. 505–506):

> The seepage producing the artificial flow is part of the water which the plaintiff, *in virtue of its appropriation,* takes from the Shoshone River and conducts to the project lands in the vicinity of the ravine for use in their irrigation. The defendants insist that when water is once used under the appropriation it cannot be used again,—that the right to use it is exhausted. *But we perceive no ground for thinking the appropriation is thus restricted. According to the record it is intended to cover, and does cover, the reclamation and cultivation of all the lands within the project.* A second use in accomplishing that object is as much within the scope of the appropriation as a first use is.
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> A further contention is that the plaintiff sells the water before it is used, and therefore has no right in the seepage. *But the water is not sold.* In disposing of the lands in small parcels, the plaintiff invests each purchaser with a right to have enough water supplied from the project canals to irrigate his land, but it does not give up all control over the water or to do more than pass to the purchaser a right to use the water so far as may be necessary in properly cultivating

[8] While appellant in that case did not argue that this proviso has the effect given to it in this case by the court below, he did rely on the first part of Section 8 and set out the entire section, including the proviso, in his argument. See Brief for Appellant, p. 26, No. 37, October Term, 1923.

his land. *Beyond this all rights incident to the appropriation are retained by the plaintiff.* (Italics added.)

2. The court below emphasized that the Reclamation Extension Act of August 13, 1914 (Sec. 4, c. 247, 38 Stat. 687; 43 U. S. C. 469) provided that "no increase in the construction charges shall * * * be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entry men to be affected by such increase." (Fox R. 61.) It did not explain the relevance of this provision, but the implication appears to be that the Public Notice of February 19, 1932, restricting delivery to three or three and one-half acre-feet, except on payment of additional amounts (Fox R. 48; Ottmuller R. 45), amounted to an additional construction charge. Respondents argue that this statutory provision demonstrates the illegality of the public notice (Br. in Opp. 19).

But the statutory prohibition against increasing construction charges has no meaning apart from the contracts in which the original charges were fixed. To argue that the construction charges have in this manner been increased necessarily involves as a premise the assertion that the larger amount of water was promised by the contracts under which the original construction charges were paid. It is impossible to say that the construction charges have been increased if the original charges were to cover no more water than the three or three and one-half feet now being delivered without addi-

tional charge. Therefore, in making this argument, respondents in effect argue that the United States has not fulfilled the obligations of its contracts and thus appear to concede that the sole question is whether or not the United States has breached the obligations of its contracts.[9]

[9] While immaterial here, it might be noted in passing that the allegations of the bills do not show a breach of the contracts. It is plain that the orders here attacked cannot be argued to be a breach of the Ottmuller contract, which specifies a maximum delivery of 3 acre-feet (R. 37). It appears probable that there has been no breach of the other contracts. The Fox application calls for the "quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the project manager or other proper officer of the United States" (R. 17, 20, 24). The Parks contract calls for 3 acre-feet "or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States" (R. 17). The public notice of October 17, 1930, states that the determination referred to in contracts such as that of Parks was to be made in 1931 (Fox R. 47; Parks R. 37). The Parks bill indicates that the apparent result of this determination was to fix the necessary quantity of water at the amounts now being delivered without additional charge (R. 38). Plainly in the case of Parks, and probably in the case of Fox, the determination must be made by an officer of the United States, so the allegations of respondents (Fox R. 38; Parks R. 30), that the water now furnished is insufficient, are immaterial. The general duty of water upon the Sunnyside Division of the Yakima Project has been fixed at 3 acre-feet from the inception of the project. (See 7th Annual Report of the Reclamation Service (1908), p. 191; 8th *id.* 195; 9th *id.* 288; 10th *id.* 229; 11th *id.* 182; 12th *id.* 227; 13th *id.* 293; 14th *id.* 291; 15th *id.* 445; 16th *id.* 314; 17th *id.* 338; 18th *id.* 343; 19th *id.* 367; 20th *id.* 346; 21st *id.* 110; 22d *id.* 114; 23d *id.* 75; 24th *id.* 99; 25th *id.* 79.)

3. In 1917 the Washington legislature enacted a new Water Code. Laws of 1917, c. 117, p. 447; 8 Remington's Rev. Stats. Secs. 7351 *et seq.* In Section 1 it was provided that waters thereafter should be acquired "only by appropriation for a beneficial use." (8 Remington, Sec. 7351 *infra*, p. 35.) In Section 39 it was provided that "The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used." (8 Remington Sec. 7391.) Respondents argue that these provisions give them a property in the water used on their land and make their claims independent of their contracts with the United States (Br. in Opp. 10, 12, 16, 21). The court below seems by implication to have adopted the same view (Fox R. 60).

It is doubtful that these provisions have the force ascribed to them by respondents.[10] The Supreme Court of Washington has on two occasions considered, in the light of the 1917 Code, disputes between a landowner and the water distributor. In each case its emphasis was placed entirely upon the contract between the parties and neither case contains any indication that the landowner had acquired property rights in the water apart from the contract. *Madison* v. *McNeal*, 171 Wash. 669; *Wenatchee Reclamation District* v. *Titchenal*, 175

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[10] Compare the legislative history of the substantially similar provision in the Reclamation Act, *supra*, pp. 21–22.

Wash. 398. In the latter case the court said (pp. 403–404):

> * * * if the land owner here had title to the appurtenant water, that title must be a limited one, to be enjoyed only according to its limitations, and those limitations, of course, are to be determined by the terms of the contract.

But it is immaterial here whether or not the 1917 Code justifies respondents' interpretation. The water rights in question were appropriated in 1906 or before and there does not seem to be any serious question but that the United States, rather than the landowners, was the appropriator and owner under the older law. Section 1 of the 1917 Code expressly provides:

> Nothing contained in this act shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise.

The very clause of Section 1 relied upon by respondents provides that "*subject to existing rights*" all waters belong to the public and may be acquired only by appropriation for a beneficial use. It is plain that the 1917 Code cannot serve to qualify the full rights which the United States acquired prior to its passage.

2. *The Suits Relate to Property Interests of the United States*

The court below held that these claims were not based on the contracts with the United States be-

cause respondents sought merely to protect their property rights in the water against the enforcement of the illegal order. (Fox R. 59–60.) This seems also to be the position of the respondents. (Br. in Opp. 11–12, 19–23.) Indeed, the suits must necessarily be held to have been brought on contracts with the United States unless the respondents succeed in showing a property right, wholly independent of these contracts, which has allegedly been invaded.

The Government believes that it has demonstrated that this premise of the decision below is wholly erroneous. It seems clear that respondents have no claim whatever save that which rests upon the contracts with the United States, the sole appropriator and owner of the water rights in question.

However this may be, the point now to be emphasized is that respondents' claim of jurisdiction in the courts below is necessarily based upon an alleged property right which is asserted in opposition to the claim of the United States.[11] The necessary foundation of the bills may be paraphrased as the allegation that the Secretary of the Interior

[11] Each of the bills alleges that "absolute title in fee simple of 4.84 [or 6 or 5.56] acre-feet of water per acre per annum became and is now vested in the plaintiff[s]." (Fox R. 34–35; Parks R. 26; Ottmuller R. 27.) The public notices, attached as exhibits to the bills, make it clear that the Government officials view the water as owned by the United States and the rights of the landowners as purely contractual. (Fox R. 46–49; Parks R. 36–39; Ottmuller R. 43–46.)

threatens to interfere with the respondents' water rights which are owned independently of the contracts by which the United States agrees to furnish the water. To decide if the United States is a necessary party, when it is objected that these are suits on contracts of the United States, it is accordingly necessary to decide whether the water rights are owned by the United States or by the respondents. Thus, the very claim that the United States is not a necessary party rests upon a request that the court adjudicate that the claim of the United States to ownership of the water must fall before the claims of the respondents. It is plain that such a plea for jurisdiction is self-defeating, in that the court can grant it only by making a preliminary decision as to the ownership of property in the possession of and claimed by the United States, which is therefore an indispensable party defendant.

Such was the decision of the Circuit Court of Appeals for the Ninth Circuit in *American Falls Reservoir District No. 2* v. *Crandall,* 82 F. (2d) 973 (rehearing denied, September 28, 1936). There the plaintiff sought an adjudication, under Idaho procedure, of its natural-flow water rights. These rights were asserted under Article XV, Section 4 of the Idaho constitution, roviding that no landowner should without his consent be deprived of the annual use of water rights used for agricultural purposes "under a sale, rental or distribution." The Reclamation officials were made

parties defendant and moved to dismiss because the United States was an indispensable party defendant. The court did not touch upon the effect of the contract between the plaintiff and the United States but dismissed the bill because the suit could be maintained only if the plaintiff were declared to have a property right opposed to the claim of the United States. It said (p. 978):

> Of course, it could be considered that appellant has acquired a vested right, and is merely attempting to require the Secretary to proceed in conformity with the constitutional provisions hereinabove quoted. However, it seems to us that the nub of the question would be, first, whether or not appellant has acquired a vested right, and to determine in favor of appellant on such a question would be depriving the United States of its property right (claimed by appellant in this suit) without giving the United States an opportunity to defend the suit. This we cannot do; therefore we hold that the suit should have been dismissed on that ground. We pass, as not needing discussion, the other grounds urged for a dismissal.

It seems self-evident, in the *Crandall* case and in the case at bar, that both the relief asked and the basis of jurisdiction sought to be invoked involve a decision as to the ownership of property claimed by the United States. It necessarily follows that the courts below were without jurisdiction. As this Court declared in *Goldberg* v. *Daniels,* 231 U. S. 218, 221–222:

> The United States is the owner in possession of the vessel. It cannot be interfered with behind its back and, as it cannot be made a party, this suit must fail. *Belknap* v. *Schild,* 161 U. S. 10. *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601, 606. *Oregon* v. *Hitchcock,* 202 U. S. 60, 69. *Naganab* v. *Hitchcock,* 202 U. S. 473, 476.

This Court has recently dealt with an analogous situation in *Arizona* v. *California,* No. —, Orig., October Term, 1935. There the Court was speaking of the interest of the United States in the control of navigable waters, but its decision is fully applicable to the control of waters appropriated and owned for the purposes of an irrigation project. This Court held (pamphlet, pp. 10–11):

> Every right which Arizona asserts is so subordinate to and dependent upon the rights and the exercise of an authority asserted by the United States that no final determination of the one can be made without a determination of the extent of the other. Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality. *California* v. *Southern Pacific Co.,* 157 U. S. 229, 251, 257; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 235, 245–247); *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601, 606; *Texas* v. *Inter-*

state Commerce Commission, 258 U. S. 158, 163.

These suits not only seek to establish a property right in the water in opposition to the claim of the United States, but also seek to interfere with the operation and management of the reservoirs and distribution system of the United States. The relief sought is, in substance, that the respondents be restored to their former "rights and privileges" to receive the additional amounts of water (Fox R. 41; Parks R. 33; Ottmuller R. 34). This would require that water be stored in the reservoirs, that the headgates be adjusted, and that water be delivered to the respondents in the amounts to be fixed by the decree. Section 6 of the Reclamation Act, (43 U. S. C. 498, *infra*, p. 35) provides "That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress." It is plain that these bills contemplate a direct interference with the rights of property and management which are guaranteed by this section.

This conclusion is reinforced when the interest of the United States is viewed not only as one relating to its ownership of property but as one affecting a basic element of its reclamation policy. The orders attacked by the respondents recite that the water furnished them must be limited to the amount specified in their contracts in order to supply water to the Kittitas division (Fox R. 47; Parks R. 37; Ottmuller R. 43). The situation thus

appears to be one in which respondents seek to have enforced a right in opposition to the interest of the United States in (1) making an equitable distribution of a limited supply of water, and (2) in fulfilling the terms of its contracts with other landowners. While not a right superior to state law and policy, in the sense that Federal control of navigation is superior, the great importance of the proprietary and, broadly speaking, governmental interests of the United States requires, as in *Arizona* v. *California, supra,* that the litigation be dismissed because of the necessity that the United States be made a party defendant.

CONCLUSION

For the reasons which have been set forth in the foregoing, it is respectfully submitted that the judgments below should be reversed with directions that the bills of complaint should be dismissed.

STANLEY REED,
Solicitor General.

HARRY W. BLAIR,
Assistant Attorney General.

D. B. HEMPSTEAD,
Special Assistant to the Attorney General.

WARNER W. GARDNER,
Attorney.

FREDERICK BERNAYS WIENER,
Assistant Solicitor,
Department of the Interior,
Of Counsel.

NOVEMBER, 1936.

APPENDIX

UNITED STATES CODE, TITLE 43

SEC. 372. *Water right as appurtenant to land and extent of right.*—The right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. (June 17, 1902, c. 1093, Sec. 8, 32 Stat. 390.)

SEC. 373. *General authority of Secretary of Interior.*—The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this chapter into full force and effect. (June 17, 1902, c. 1093, Sec. 10, 32 Stat. 390; Aug. 13, 1914, c. 247, Sec. 15, 38 Stat. 690.)

* * * * *

SEC. 383. *Vested rights and State laws unaffected by chapter.*—Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal

Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (June 17, 1902, c. 1093, Sec. 8, 32 Stat. 390.)

* * * * *

SEC. 498. *Transfer of management and operation of works to water users generally.*—When the payments required by this chapter are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided,* That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress. (June 17, 1902, c. 1093, Sec. 6, 32 Stat. 389.)

REMINGTON'S REVISED STATUTES OF WASHINGTON

SEC. 7351. *State control—Appropriation of water rights—Existing rights preserved.*—The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this act provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations

the first in time shall be the first in right. Nothing contained in this act shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise. They shall, however, be subject to condemnation as provided in section 7354 hereof, and the amount and priority thereof may be determined by the procedure set out in sections 7364 and 7377 inclusive hereof. [L. '17, p. 447, Sec. 1.]

SEC. 7408. *Eminent domain by United States.*—The United States is hereby granted the right to exercise the power of eminent domain to acquire the right to the use of any water, to acquire or extinguish any rights, and to acquire any lands or other property, for the construction, operation, repairs to, maintenance or control of any plant or system of works for the storage, conveyance, or use of water for irrigation purposes, and whether such water, rights, lands or other property so to be acquired belong to any private party, association, corporation or to the state of Washington, or any municipality thereof; and such power of eminent domain shall be exercised under and by the same procedure as now is or may be hereafter provided by the law of this state for the exercise of the right of eminent domain by ordinary railroad corporations, except that the United States may exercise such right in the proper court of the United States as well as the proper state court. [L. '05, p. 180, Sec. 1.]

SEC. 7411. *Appropriation—Title to beds and shores.*—Whenever said secretary of the interior or

other duly authorized officer of the United States shall cause to be let a contract for the construction of any irrigation works or any works for the storage of water for use in irrigation, or any portion or section thereof, for which the withdrawal has been effected as provided in section 7410, any authorized officer of the United States, either in the name of the United States or in such name as may be determined by the secretary of the interior, may appropriate, in behalf of the United States, so much of the unappropriated waters of the state as may be required for the project, or projects, for which water has been withdrawn or reserved under the preceding section of this act, including any and all divisions thereof, theretofore constructed, in whole or in part, by the United States or proposed to be thereafter constructed by the United States, such appropriation to be made, maintained and perfected in the same manner and to the same extent as though such appropriation had been made by a private person, corporation or association, except that the date of priority as to all rights under such appropriation in behalf of the United States shall relate back to the date of the first withdrawal or reservation of the waters so appropriated, and in case of filings on water previously withdrawn under said section 7410, no payment of fees will be required. Such appropriation by or on behalf of the United States shall inure to the United States, and its successors in interest, in the same manner and to the same extent as though said appropriation had been made by a private person, corporation or association. The title to the beds and shores of any navigable lake or stream

utilized by the construction of any reservoir or other irrigation works created or constructed as a part of such appropriation hereinbefore in this section provided for, shall vest in the United States to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works. [L. '29, p. 183, Sec. 1. Cf. L. '05, p. 182, Sec. 4.]

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